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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-338

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

v.

CHAS. PFIZER & CO., INC., et al. STATE OF WEST VIRGINIA, et al., STATE OF NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT STATE OF NEW YORK'S BRIEF IN OPPOSITION

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RESPONDENT STATE OF NEW YORK'S BRIEF IN OPPOSITION

The State of New York, one of the government respondents, opposes petitioners' petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit (440 F. 2d 1079) unanimously affirming the District Court's order and judgment (314 F. Supp. 710) approving pursuant to Rule 23(e) of the Federal Rules of Civil Procedure a proposed compromise and settlement of sixty-six antitrust class actions.

Question Presented

Whether the Court of Appeals erred in its evaluation and decision that the District Court's approval of a compromise and settlement of sixty-six antitrust class actions was proper and well within its discretion?

Statement of the Case

Petitioners Cotler Drugs and Louis Patlogan who did not have their way in negotiating for a larger share of the $100 million settlement proposal (J. App. 71)* and who failed to secure a judicial renegotiation of the settlement proposal by the courts below (314 F. Supp. 710; aff'd 440 F. 2d 1079 [2d Cir. 1971] (Cotler App. I, II), again seek judicial renegotiation for another chance to increase their share.

The State of New York, by its Attorney General, on behalf of itself and as representative of its political subdivisions and individual citizens joined with numerous co-plaintiffs in recommending approval of the "Alabama Plan," as modified, as fair and reasonable. The sum of $3.9 million was allocated to the State of New York and its class** (44 political subdivisions; 62 welfare districts; 4,235 individual consumers) (314 F. Supp. at 737). The dissenting minority's failure to have their way and their dissatisfaction with the majority approved division do not warrant its rejection and reversion of sixty-six multi-district class actions to a litigation status.

The settlement proposal (J. App. 71) adopting for its judicial administration, evaluation, and approval the proce-

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* References to petitioners' Joint Appendix below.

** See separate order and judgment, *State of New York* v. *Chas. Pfizer & Co., Inc.* (68 Civ. 845, S.D.N.Y.).

dural due process framework of Rule 23, Federal Rules of Civil Procedure, is not here challenged by petitioners. It is clear and unambiguous so that each class representative in the performance of its duties and obligations to class members, could prior to acceptance make adequate evaluation of its present and prospective effects and application. The settling parties and their class representatives were thus clearly identified (J. App. 71): "A. * * * states, counties, cities and their political subdivisions and agencies * * *. B. * * * wholesalers, retailers and individual consumers arising out of their purchases, including claims of states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state."

Moreover, each accepting class representative was fully apprised by its terms of the options, methods and procedures for the proposal and selection of multiple allocation plans (J. App. 73) and petitioners freely exercised their options (J. App. 81). Upon defendants' election as authorized by the settlement proposal (par. E [1], J. App. 73) of the allocation plan ("Alabama Plan," J. App. 101, as modified, J. App. 134) accepted by a majority of the government class representatives and by eleven of the thirteen members of the Committee of Counsel for the consolidated wholesaler-retailer class (J. App. 288, 307), and within the procedural due process provisions of Rule 23 provided in the settlement proposal—notice and hearing—the District Court made a careful and comprehensive analaysis and evaluation of all issues, contentions and circumstances (314 F. Supp. 710; Cotler App. I).

Opinions Below

The District Court (Wyatt, J.) held that the "Alabama Plan" with its calculations of purchases and adequacy of class allocations predicated upon reliable public and official sources of information (e.g., number of

hospital beds from American Hospital Association Guide (J. App. 120); state public assistance reimbursement from H.E.W. publications (J. App. 110, 121-123), was the "most comprehensive of the plans filed (314 F. Supp. at 727; Cotler App. I, 32) and that "[t]here is no sufficient reaosn for rejecting the method of division of the Alabama Plan" (*id.* at 744).

The Court of Appeals unanimously affirmed the trial court's approval as properly within its judicial discretion "commend[ing] Judge Wyatt for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation" (440 F. 2d 1079; Cotler App. II, 25)—the second commendation (*In Re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs,* 320 F. Supp. 586, 588 [J.P.M.L. 1970]). It defined the scope of appellate review of the trial court's discretion by an "attempt to arrive at some evaluation of the points of law on which the settlement is based" without the need for "dispositive conclusions of the admittedly unsettled legal issues which the case raises" (440 F. 2d 1086; Cotler App. II, 11). Moreover, pursuant to this Court's recent declarations of national antitrust enforcement policy, the Court predicated its independent evaluation and affirmance of the exercise of the District Court's discretion upon the "result orientation with which the Court has approached the whole area of private treble-damage litigation" (440 F. 2d at 1087; Cotler App. II, 14).

REASONS FOR DENYING CERTIORARI

(I)

Petitioners' request that this Court exercise its discretion to review this settlement and make "positive pronouncement[s]" (Pet. 32); "clarify" (Pet. 52) and "exercise its supervisory powers" in the "construction of

Rule 23'' (Pet. 46), is predicated upon their exaggerated and fanciful fears and apprehensions of alleged conflicts of law in the opinions below which purportedly may adversely affect "future antitrust precedent and litigation" (Pet. 25).

Their exhaustive debate with each and every item and judicially approved criterion applied by the trial court in its comprehensive evaluation rebuts petitioners' contention that contrary to *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir. 1942), the trial court "relied almost solely upon the recommendations of attorneys" (Pet. 34), and belies their allegation that the scope of appellate review here applied to a compromise raises a "direct conflict" (Pet. 33) between circuits.

They do not challenge the decision upon the traditional criteria of appellate review of discretionary orders in evaluating compromises, e.g. adequacy of the record and hearing to evidence an "informed judgment" (*Bysheim* v. *Miranda* [not officially reported] 44 N.Y.S. 2d 15, 22 [Sup. Ct. N.Y. Co. 1943]; the "canvass of factual aspects of the litigation" (*City of New York* v. *International Pipe & Ceramics,* 410 F. 2d 295, 298 [2d Cir. 1969]); the judge's experience including scope and length of assignment (*In re Prudence-Bonds Corporation,* 148 F. 2d 323 [2d Cir. 1945]); and the required balance and resolution of competing claims and relevant policies (*Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.,* 363 U.S. 528, 535 [1960]).

Instead, in a transparent attempt to tailor the petition to this Court's criteria for the grant of *certiorari,* they seek to elevate "the evaluation of points of law upon which the settlement is based" (440 F. 2d at 1086; Cotler App. II., 11)—including the legal framework of the settlement proposal which identifies the consumer class and their class representatives which the petitioners and all settling parties accepted—to the status of judicial

precedent. An examination of some of petitioners' version of certain decisions discloses the absence of any real or potential conflict of judicial precedents warranting *certiorari*.

(II)

Petitioners' contention that the Court's approval of the trial court's designation of New York and other plaintiff states as representatives of individual purchasers of antibiotic drugs—similarly situated parties—constitutes the "creation of a new right contrary to existing authority" (Pet. 39), is makeweight. Rule 23(a), Federal Rules of Civil Procedure, provides that "[o]ne or more members of a class may sue * * * as representative parties on behalf of all * * *". States have assumed such responsibility before. See *State of New York* v. *Harper & Row Publishers* (Record, 68 Civ. 4205, S.D.N.Y., 69 Civ. 48 N. D. Ill.; Rule 23[e] approval of compromise and intra class allocation plan for 512 school districts, and 14 library systems with 551 member libraries); 301 F. Supp. 484 (N. D. Ill. 1969); *State of Iowa* v. *Union Asphalt*, 281 F. Supp. 391 (S. D. Iowa, 1968). As the Court of Appeals pointed out (Cotler App. II, 19), the District Judge upheld the right of the States as consumers under Rule 23(a) and, consequently, never reached the question of the States as *parens patriae*, contrary to the assertion of petitioners.

So far as New York is concerned it has statutory authority to seek restitution for wronged consumers, apart from common law. (Gen. Bus. Law, § 342b; Executive Law, § 63[1][12].)

(III)

Petitioners' contention that the District Court's application of *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U. S. 48 (1968) has "destroyed" its certainty and

"will cause confusion in all the circuits * * *" (Pet. 25) and that "enforcement of the national policy has been lost" (Pet. 21), is simply a self-serving effort to collect the consumers' share of the settlement. This Court did not declare in that decision, as petitioners suggest, that in all cases the initial purchaser has the exclusive right to recover damages. The suggestion by petitioners of alleged potential conflict is refuted by the Court of Appeals' explanation of the settlement plan as consistent with antitrust policy (440 F. 2d 1088) that "the passing-on doctrine is not here being used as a defense to permit the defendants to escape liability, but rather as an attempt to award damages, insofar as is possible, to those who ultimately paid higher prices as a result of the collusive pricing, and to avoid giving a windfall gain to those who rather clearly were not injured." Moreover, the Court said that the District Court's consideration of wholesaler-retailers' arrangements for resale "at cost plus a set percentage markup (for wholesalers 16⅔%, for retailers 66⅔%)" was consistent with this Court's policy (440 F. 2d 1088; Cotler App. II, 17).

(IV)

The Court of Appeals correctly rejected petitioners' challenge to the adequacy of the Notice to consumers as the "best notice practicable under the circumstances * * *" (Rule 23[c] [2]) (440 F. 2d at 1090-1091; Cotler App. II, 21). The repetition of the challenge here is frivolous.

The District Court properly evaluated the compromise plan and the adequacy of the allocation to each class. It was not required to comparatively measure the adequacy of the inter-class allocation and, more particularly, to measure it and make readjustments by the size and number of each class' responses since Rule 23 does not require affirmative responses. One class cannot reach into the other class'

allocation as petitioners here contend, in order to cut into all or part of the consumers' share.

Moreover, the fairness and adequacy of each allocation having been separately evaluated and determined, there is no harm to petitioners or to anyone else—including class members who did not elect to opt out—as the Court of Appeals noted (440 F. 2d at 1091; Cotler App. II, 23) that any balance at this time, if any* will be distributed to the State "for the benefit of the citizens of [the] State in such manner as the Court may direct" (Cotler App. I, 28). Petitioners' objections (Pet. 58-59) are clearly without merit.

(V)

Nor can petitioners' here secure *certiorari* derivatively by their attempt to tag this case along with the grant of *certiorari* in *State of Hawaii* v. *Standard Oil Co.*, 401 U.S. 930 (1971) (Count II damage to economy) (Pet. 52, 54) on their mistaken assumption that there is presented to this Court a common forum to undertake a comprehensive examination of the "entire area of *parens patriae* recovery by states under Section 4 of the Clayton Act * * *" (Pet. 53). As we have stated the Court of Appeals concluded "evaluation of the *parens patriae* doctrine * * * is unnecessary because the trial judge "made it quite clear * * * that he was proceeding solely on the basis of a Rule 23 class action" (440 F. 2d 1089; Cotler App. II, 19). Their further suggestion that joint review with *certiorari* in *United States* v. *Chas. Pfizer*, —— U.S. —— (1971), may somehow result in renegotiation of the settlement and thereby increase their share (Pet. 55), is sheer speculation and inconsistent with the judicial principles and policies

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* Estimated allocation to State of New York class of about $1.6 million (less court approved out of pocket expenses) is reasonably accurate to cover the actual amount of claims filed, about $1.7 million.

of compromise and settlement and the finality of judgments. See, *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, July 27, 1971.

Respectfully submitted,

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